Supreme Court,
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No. 92-1472

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHICAGO TRANSIT AUTHORITY,

Petitioner,

v.

JAE BOON LEE, Administratrix of the Estate of Sang Yeul Lee, Deceased,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Was any federal question preserved in the state court proceedings?

II. Does this case present only state common law issues relating to state common law duties of landowners?

III. Was petitioner afforded due process?

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CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

FOURTEENTH AMENDMENT

Section 1. Citizens of the United States

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1257. **State courts; certiorari**

(a) Final judgment or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Rule 10 of the Supreme Court Rules provides, in relevant part:

CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a

way that conflicts with applicable decisions of this Court.

STATEMENT OF THE CASE

This is a garden variety wrongful death action employing the state common law of Illinois. The matter was tried in the Circuit Court of Cook County in the Illinois state court system resulting in a jury verdict for the plaintiff (respondent). No constitutional questions were raised or passed on by the Circuit Court.

The petitioner (defendant) successfully appealed to the Appellate Court for the First Appellate District of the State of Illinois, and the judgment of the Circuit Court of Cook County was reversed. No constitutional questions were raised or passed on by the Appellate Court. (Petitioner's Appendix, p. 43-57).

The respondent (plaintiff) successfully appealed to the Supreme Court of Illinois and the judgment of the Circuit Court of Cook

County was reinstated. No constitutional questions were raised or passed on by the Supreme Court of Illinois. (Petitioner's Appendix, p. 1-41).

The petitioner filed an extensive Petition for Rehearing. (Petitioner's Appendix, p. 59-89). No constitutional questions were raised. What was stated in the extensive Petition which even colorably addressed a Constitutional issue is the following:

> Because the jury was given both duty of care and warning instructions that did not reflect the actual duty owed the plaintiff's husband, the jury could not--and did not--make a finding that the CTA breached the duty that the Court has now recognized in adopting section 337. But see supra note 4. If this Court does not reconsider and reject the new duty that it had created, it must allow a jury to properly consider whether the CTA breached that new duty. Failure to spell out that new duty (if it is intended to be more expansive than that found in section 337) and failure to grant a new trial would constitute a grave denial of due process. (Respondent's Appendix, p. 3)

RELEVANT FACTUAL OMISSIONS

United States Supreme Court Rule 24.2 states (in part) that Respondent's Brief shall contain no statement of the case "... beyond what may be deemed necessary to correct any inaccuracy or omission in the statement by the other side." The petitioner correctly identified the location where their tracks and 600 volt electrified third rail intersected streets and sidewalks at ground level. At those ground level crossings the electrified third rail runs up to within approximately six feet of the edge of the public sidewalk. (R 260, 261)

At trial, defendant admitted that in the ten years prior to plaintiff's decedent's death an average of one person per year had been killed or injured on these ground level third rails. The defendant was aware of the dangers of the ground level third rail and

even instructed its employees how to work around and near it. The defendant admitted that it was aware that pedestrians had been walking into the track area where the third rail was located from the public sidewalk approximately six feet away. The defendant stipulated at trial that it reasonably anticipated persons contacting this ground level third rail and being killed or injured. (R 695)

There were some general warnings where plaintiff's decedent was killed. The defendant admitted through three different supervisors, including its safety director, that the signs did not in fact warn or inform of any electricity in a rail along the ground or of its lethal power. (R 638, 914) The uncontradicted testimony was that the signs were placed behind the third rail so that one reading the signs would come onto the third

rail before reading the sign. It was uncontradicted and admitted by defendant at trial that the signs used by the defendant failed to warn of the danger of death or serious injury and failed to warn that the danger was located in an electrified rail along the ground, six feet from the sidewalk. (R 645-46) Plaintiff's expert testified that the warning signs were inadequate. (R 632-4, 1126-8)

MISSTATEMENTS CONTAINED IN PETITIONER'S BRIEF

The most blatant of petitioner's misstatements is that "... the Illinois Supreme Court affirmed the Appellate Court's holding that the jury had been improperly instructed ..." (Petition for Writ of Certiorari, p. 9). It is clear from the Opinion that the Illinois Supreme Court held just the opposite. "Thus, the jury instruction ... correctly instructed the jury

that the CTA owed plaintiff's decedent a reasonable duty of care." Lee v. Chicago Transit Authority, 152 Ill.2d 432, 605 N.E.2d 493 (1992).

The Illinois Supreme Court based its holding on the Restatement (Second) of Torts, Section 337 (1965), which provides:

> **Section 337. Artificial Conditions Dangerous to Known Trespassers**
>
> A possessor of land who maintains on the land an artificial condition which involves a risk of death or serious bodily harm to persons coming in contact with it, is subject to liability for bodily harm caused to trespassers by his failure to exercise reasonable care to warn them of the condition if
>
> (a) the possessor knows or has reason to know of their presence in dangerous proximity to the condition, and
>
> (b) the condition is of such a nature that he has reason to believe that the trespasser will not discover it or realize the risk involved.

Section 337 also mirrors the exact instructions given by the trial court to the jury.

> The CTA was under a duty not to [injure] Sam [sic] Yeul Lee, however, if the CTA knows or to facts known to it should reasonably anticipate the presence of Sam Yeoul [sic] Lee in the place of danger, it is then under the duty to use ordinary care not to injury [sic] Sam Yeoul [sic] Lee." Lee v. Chicago Transit Authority, 152 Ill.2d 432, 605 N.E.2d 493 (1992).

Petitioner misstates that "... the Illinois Supreme Court ... agreed and held that when this case was tried it was tried under an erroneous theory of law..." (Petition for Writ of Certiorari, p. 9). Nowhere in the Opinion is this statement found. This is also completely contrary to the holding of the Illinois Supreme Court as stated in the Opinion. The Illinois Supreme Court based its holding on the theory that defendant failed to adequately warn. This is the same theory on

which the case was tried and on which the jury verdict was rendered.

> [t]he jury returned a general verdict in which it found inter alia that the CTA "failed to adequately warn of electricity in its third rail". Lee v. Chicago Transit Authority, 152 Ill.2d 432, 605 N.E.2d 493 (1992).

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Respondent objects to the jurisdiction of the United States Supreme Court, and states that the provisions of the Fourteenth Amendment have not been drawn into question by the present case. The petitioner did not raise the issue of the claimed denial of its constitutional right to a fair trial and trial by jury until it filed its Petition for Writ of Certiorari. No federal or state constitutional question or federal statute was drawn into question at the Trial, Appellate or State Supreme Court levels. The petitioner

was not deprived of its constitutional rights to a fair trial or trial by jury.

I.

NO FEDERAL QUESTION WAS RAISED OR PRESERVED BEFORE ANY STATE COURT OF ILLINOIS NOR WAS ANY FEDERAL QUESTION DECIDED BY ANY COURT.

This Court has long recognized that in order for Title 28, Section 1257 jurisdiction to attach to a state supreme court's decision, the state court must have decided a federal issue at some point in the state proceedings. Illinois v. Gates, 462 U.S. 213, 217-222 (1983); State Farm Mutual Automobile Ins. Co. v. Duel, 324 U.S. 154, 160 (1945); Hill v. California, 401 U.S. 797, 805-806 (1971).

In Cardinale v. Louisiana, this Court held:

> ... the sole federal question argued here had never been raised, preserved or passed upon in the state courts below. It was very early established that the court will not decide federal constitutional issues raised here for the

> first time on review of state court decisions.
>
> ... Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind ... Even though states are not free to avoid constitutional issues on inadequate state grounds, O'Connor v. Ohio, 385 U.S. 92 (1966), they should be given the first opportunity to consider them. Cardinale v. Louisiana, 394 U.S. 437, 439 (1969).

As this Court explained in the seminal case of McGoldrick v. Compagnie General Transatlantique, 309 U.S. 430 (1940):

> But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below... In cases coming here from state courts in which a state statute is assailed or unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. McGoldrick v. Compagnie General Transatlantique, 309 U.S. 430, 434-435 (1940).

These same principles hold true when the constitutionality of a state supreme court's decision has been called into question. As Justice Brennan has written:

> ... the federal question must have been properly raised in the state courts. This is required because the state courts must first be afforded an opportunity to consider and decide the federal question. Justice Brennan, State Court Decisions and the Supreme Court, 31 Penn. Bar Assn. Q 393, 399-400 (1960).

In the present case, the petitioner has failed to raise any federal question in the state court system. The only mention of due process prior to the present Petition for Writ of Certiorari is by a passing reference in the Petition for Rehearing filed before the Illinois Supreme Court. (Respondent's Appendix, p. 1) This reference is plainly insufficient. This Court has stated that in a challenge to state law based on the constitution:

> ... the claim of invalidity on the ground therefor be brought to the attention of the state court with fair precision and in due time. Pruneyard Shipping Center v. Robins, 447 U.S. 74, 85-6, n9 (1980) citing New York ex rel Bryant v. Zimmerman, 278 U.S. at 67.

Here, petitioner even failed to state whether their claimed denial of due process was based on the State or Federal Constitution. It failed to provide the Illinois Supreme Court with any analysis or authority. The lower court was left to guess how petitioner was denied due process and what, if any, federally protected right was infringed. The issue was not considered, as the court summarily denied the Petition. (Petitioner's Appendix, p. 42)

II.

THIS CASE PRESENTS ONLY STATE COMMON LAW ISSUES WHICH RELATE TO COMMON LAW DUTIES OF LANDOWNERS.

The issue in this case involves whether a possessor of land owes a duty of reasonable care to a trespasser under a very particular

set of facts. This very issue was raised, argued, briefed and ruled on repeatedly throughout the entire state judicial proceeding. None of the issues which were raised throughout the proceedings drew into question a federally protected right. It was not unexpected that the Trial Court, Appellate Court and Illinois Supreme Court would rule on these issues, or that the Illinois Supreme Court would affirm the trial court's ruling that defendant was under a duty to use ordinary care under these facts. Contrary to the Supreme Court Rules, the Petition for Writ of Certiorari attempts to draw this Court's attention to numerous facts and issues that have been carefully litigated and considered by the lower courts. As the Honorable Justice Holmes stated in U.S. v. Johnson, 268 U.S. 227 (1924) "we do not grant certiorari to review evidence and discuss specific facts".

It is the prerogative of the state courts to interpret and clarify the state common law. The common law is not a stagnant, codified set of rules. Rather it constantly changes and expands from time to time as state courts interpret and apply the common law to differing factual situations. As the Opinion states:

> Our determination of the existence of a duty here, we believe, is properly reflective of the prevailing social policies. Lee v. Chicago Transit Authority, 152 Ill.2d 432, 605 N.E.2d 493 (1992).

There are numerous common law rules and exceptions to be found in Illinois case law setting out the duties owed by landowners to entrants on their land. This Court recognized in Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 3 LEd. 2d 550, 79 Sup. Ct. 406 (1959), the numerous and complicated distinctions found in the common law of premises liability.

> In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each. Yet even within a single jurisdiction, the classifications and sub-classifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, towards imposing on owners and occupiers a single duty of reasonable care in all the circumstances.[1]

The Restatement (Second) of Torts (1965) has 62 sections and over 131 pages devoted to the reporting of common law premises liability theories. The Notes on Use to Illinois Pattern Jury Instruction 120.02 refer trial judges and lawyers to A.L.I. Restatement of

---

[1]See Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, at 631, Footnote 8. "... a survey here of the thousands of judicial decisions in this area during the last hundred years is as unnecessary as it would be impossible."

Torts, Section 337 for a further reference to the common law duties owed to an entrant on the land under a particular set of facts.

In exercising its authority to interpret and expand Illinois common law, the Illinois Supreme Court found that those facts did exist here.

> We find that the requirements of Section 337 have been satisfied. Thus, we hold that the defendant owed plaintiff's decedent a duty of ordinary care to properly warn of the third rail. Lee v. Chicago Transit Authority, 152 Ill.2d 432, 605 N.E.2d 493 (1992).

The Illinois Supreme Court went on to hold that the jury instruction given by the trial court was a proper statement of the duty owed under Section 337.

> Thus, the jury instruction, though premised on the theory that the defendant was engaged in an activity, correctly instructed the jury that the defendant owed plaintiff's decedent a reasonable duty of care. Lee v. Chicago Transit Authority, 152 Ill.2d 432, 605 N.E.2d 493 (1992).

The petitioner is merely attempting to elevate a state court's findings on a common law issue to a Fourteenth Amendment due process claim.

> The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decision of the state court upon questions of state law. Enterprise Irrigation District, et al. v. Farmers Mutual Casualty Company, et al., 243 U.S. 157 (1917) [citations omitted].

III.

PETITIONER WAS AFFORDED DUE PROCESS.

Apart from the procedural defect (failure to adequately and timely present the constitutional issue), and the lack of any true federal question or constitutional issue, the petitioner has not been deprived of substantive due process. The issue of failure to adequately warn was raised throughout the state court proceedings. Plaintiff's original Complaint and each amended Complaint alleged

that defendant failed to adequately warn pedestrians of the electrified third rail. (Respondent's Appendix, p. 5, 7, 9, 11)

As noted earlier, the evidence at the jury trial was that the defendant did not warn of the lethal danger of the electrical current, nor did the signs alert the public of the location of the current or of the third rail six feet from the sidewalk. The issue instruction, in part, given to the jury was that the defendant was negligent in that it:

> Failed to adequately warn pedestrians of the presence of the electrified third rail on the Ravenswood line at Kedzie Avenue crossing, which carried, supplied and distributed electric energy. (R 1472-3)

The petitioner raised the failure to adequately warn issue and made arguments concerning it at the Trial, Appellate and Illinois Supreme Court levels.

Following the Illinois Supreme Court's Opinion, the petitioner failed to raise any

federal constitutional question in their Petition for Rehearing. After 15 years of protracted litigation, it is incorrect for petitioner to now claim they have been denied procedural or substantive due process under the Fourteenth Amendment. In all fairness, the Illinois state court system has given defendant's position extensive consideration at every level.

CONCLUSION

The Petition for Writ of Certiorari to the Supreme Court of Illinois should be denied for the following reasons:

First, nowhere in its papers at any level of the state court system of Illinois has petitioner raised or preserved issues which might entitle it to seek review of the Supreme Court of the United States. No court at the state level decided or was asked to decide a question of federal law, let alone one which

conflicts with applicable decisions of this Court. Consequently, any questions that are now first raised in the Petition are deemed waived because the lower Court had no opportunity to consider it. Illinois v. Gates, 462 U.S. 213, 217-222 (1983).

Second, the Illinois Supreme Court decided the propriety of a judgment for the wrongful death of plaintiff's decedent based on Illinois common law as determined by the Supreme Court of Illinois. There is nothing raised in the Petition which comes within gunshot of any federal question under the Fourteenth Amendment or any federal statute.

Third, the petitioner received a full and fair hearing on all issues which it raised by the Illinois Trial, Appellate, and State

Supreme Court and thus was afforded due process.

Respectfully submitted,

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APPENDIX

APPENDIX

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10.

The Court has overlooked the fact that its finding of a "jury[] finding that the CTA breached its duty to adequately warn of the electricity in its third rail" is based on assumptions that the CTA had a duty to warn of risks and that the jury was instructed that the CTA had a specific duty to warn. The CTA did not have such a duty, and the jury was not so instructed and could not have made such a "finding."

In its opinion, this Court finds that because the jury returned a general verdict for the plaintiff and because it was instructed that the CTA "failed to adequately warn of the electricity in its third rail," there was a "jury[] finding that the CTA breached its duty to adequately warn of electricity in its third rail." Lee, slip op. at 11. What the Court overlooks in reaching this finding is that the duty to warn of electricity is not one that is owed under section 337 of the Restatement, but see supra note 4, and that, even though the jury

returned a general verdict, it was not given a specific instruction that the CTA owed **only** a duty of reasonable care to warn of the condition.

Under section 337, the duty owed to the discovered (now universally reasonably anticipated) trespasser is only a duty of reasonable care to warn of the dangerous artificial condition. The jury was given the instruction because the premise of the plaintiff's case (at least by the end of trial) was that the CTA was engaged in the activity of conducting electricity and owed her husband a duty "to carry on [its] activities upon the land with reasonable care for [his] safety." Restatement (Second) of Torts § 336. If the plaintiff's husband had been a discovered trespasser and this case had been tried under section 337, that jury would have been instructed that the CTA owed a duty

to warn of the existence of the third rail, not of its risks. See supra pp. 9-10, but see supra note 4. There was no breach of that duty. See CTA Brief at 82.

Because the jury was given both duty of care and warning instructions that did not reflect the actual duty owed the plaintiff's husband, the jury could not - and did not - make a finding that the CTA breached the duty that the Court has not recognized in adopting section 337. But see supra note 4. If this Court does not reconsider and reject the new duty that it had created, it must allow a jury to properly consider whether the CTA breached that new duty. Failure to spell out that new duty (if it is intended to be more expansive than that found in section 337) and failure to grant a new trial would constitute a grave denial of due process.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

JAE BOON LEE, Administratrix of the Estate of SANG YEUL LEE, Deceased,	)	
Plaintiff,	)	
vs.	)	No. 78 L 6842
CHICAGO TRANSIT AUTHORITY,	)	
Defendant.	)	

COMPLAINT AT LAW

NOW COMES the Plaintiff, JAE BOON LEE, Administratrix of the Estate of SANG YEUL LEE, Deceased, by and through the law firm of FISHMAN & FISHMAN & SALTZBERG, P.C. and attorney George Bieber, and complaining of the Defendant, CHICAGO TRANSIT AUTHORITY, states as follows:

. . .

9. That on the aforementioned date, the Defendant was then and there guilty of one or more of the following careless, negligent and improper acts, and/or omissions:

. . .

c. Failed to post any warnings, barricades or signs to alert pedestrians of the defective and dangerous condition present thereon.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

JAE BOON LEE, Administratrix of the Estate of SANG YEUL LEE, Deceased,	)	
Plaintiff,	)	
vs.	)	No. 78 L 6842
CHICAGO TRANSIT AUTHORITY,	)	
Defendant.	)	

FIRST AMENDED COMPLAINT AT LAW

NOW COMES the Plaintiff, JAE BOON LEE, Administratrix of the Estate of SANG YEUL LEE, Deceased, by and through the law firm of FISHMAN & FISHMAN & SALTZBERG, P.C., and complaining of the Defendant, CHICAGO TRANSIT AUTHORITY, states as follows:

. . .

7. That on the aforementioned date, the Defendant was then and there guilty of one or more of the following careless, negligent and improper acts, and/or omissions:

a. Failed to post any warnings, barricades or signs to alert pedestrians of the defective and dangerous condition present thereon.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

JAE BOON LEE, Administratrix of the Estate of SANG YEUL LEE, Deceased,	)	
Plaintiff,	)	
vs.	)	No. 78 L 6842
CHICAGO TRANSIT AUTHORITY,	)	
Defendant.	)	

THIRD AMENDED COMPLAINT

NOW COMES the Plaintiff, JAE BOON LEE, Administratrix of the Estate of SANG YEUL LEE, Deceased, by and through the law firm of FISHMAN & FISHMAN & SALTZBERG, P.C., and complaining of the Defendant, CHICAGO TRANSIT AUTHORITY, states as follows:

. . .

11. That on the aforementioned date, the Defendant was then and there guilty of one or more of the following careless, negligent and improper acts, and/or omissions:

a. Failed to post adequate warnings, barricades or signs to alert pedestrians to the presence of a third rail which carried, supplied and distributed electric energy.

. . .

d. Failed to adequately warn of the existence of an electrified third rail on its rapid transit lines and in particular on the Ravenswood Line at the Kedzie Avenue crossing.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

JAE BOON LEE, Administratrix of the Estate of SANG YEUL LEE, Deceased,	)	
Plaintiff,	)	
vs.	)	No. 78 L 6842
CHICAGO TRANSIT AUTHORITY,	)	
Defendant.	)	

FOURTH AMENDED COMPLAINT

NOW COMES the Plaintiff, JAE BOON LEE, Administratrix of the Estate of SANG YEUL LEE, Deceased, by and through the law firm of FISHMAN & FISHMAN & SALTZBERG, P.C., and complaining of the Defendant, CHICAGO TRANSIT AUTHORITY, states as follows:

. . .

11. That on the aforementioned date, the Defendant, CHICAGO TRANSIT AUTHORITY, was then and there guilty of one or more of the following careless, negligent and improper acts, and/or omissions:

a. Failed to post adequate warnings, barricades or signs to alert pedestrians to the presence of a third rail which carried, supplied and distributed electric energy.

. . .

d. Failed to adequately warn of the existence of an electrified third rail on its rapid transit lines and in particular on the Ravenswood Line at the Kedzie Avenue crossing.